No. .....

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

UNITED STATES OF AMERICA,
Petitioner,

v.

ANDREW W. REIS and MILLIE REIS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINION BELOW.

The opinion of the Court of Appeals is reported at 226 F. 2d 492. The District Court wrote no opinion.

JURISDICTION.

The judgment of the Court of Appeals was entered November 2, 1955 (Pet. 16 a). The petition for a writ of certiorari was filed January 30, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

Where the trial court, acting pursuant to Rule 71 A (h) of the Federal Rules of Civil Procedure, referred this federal condemnation proceeding to commissioners rather than a jury, was such reference, under the particular facts here, within the sound discretion vested in the court by the rule?

RULE INVOLVED.

Rule 71 A (h) of the Federal Rules of Civil Procedure.

ARGUMENT.

1. There is no question in this case as to whether Rule 71 A (h) of the Federal Rules of Civil Procedure vests a discretion in the trial court to appoint commissioners to try the issue of compensation in a federal condemnation proceeding. The rule specifically so states: "* * * any party may have a trial by jury of the issue of just compensation by filing a demand therefor * * * unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. * * *" Moreover, the Government brief recognizes that a "sound discretion" is lodged in the trial court under the rule. The brief (Pet. 5, 6) quotes approvingly a Judicial Conference report interpreting the rule as "* * * authorizing reference to Commissioners only in cases wherein the judge, in the exercise of sound discretion based upon reasons appearing in the case, finds that the interests of justice so require." H. Doc. No. 490, 82d Cong., 2d sess., pp. 5-6.

Since both sides here interpret the rule as vesting discretion in the trial court, the instant case then simply involves the question of whether an abuse of discretion by the trial court has been shown. The answer, of course, will turn almost wholly upon the particular facts of the case.

2. The Government cites *United States v. Waymire*, 202 F. 2d 550 (C. A. 10), as authority for its argument that reference to a commission may be ordered only in the "exceptional" or "extraordinary" case. Presumably, petitioner regards the fact situation there as sufficiently unusual because in that case a reference to a commission was affirmed by the Tenth Circuit. But if the *Waymire*

case was "exceptional" then so is the instant case, because the material facts in the two cases, by reason of which the reference was ordered, are strikingly similar. Thus, the question of the result in what the Government might call an "ordinary" case is a point never reached in the instant case.

Indeed, the facts here are even more favorable than were those in *United States v. Wallace,* 201 F. 2d 65, where the Tenth Circuit again affirmed appointment of commissioners by a district court. In that case, after noting that the land was 60 miles from the nearest federal court town (compared with 125 miles in the instant case), and that 6 witnesses living near the land would be required to travel such distance (there were 11 such witnesses here) the court found the tract of "* * * unusual character in that it was valuable for hunting and fishing." The same grounds are present here, since, as the respondent Reis' affidavit recited (R. 94): "* * * Said flyway involved in this tract is one of the best Canada geese hunting grounds in the central part of the United States * * *."

The Government brief (Pet. 7) states: "There is no peculiar problem of transportation involved in these cases, nor are the lands unusually inaccessible for farmlands." However, as respondents' affidavit recited (R. 93), part of the road to the Reis ranch is frequently rendered impassable by rain or snow at the time of the year when federal jury terms are held in the district, and travel within the 5800 acre ranch itself is especially difficult at such times. The order appointing commissioners here specifically recited the trial court's finding that, under the circumstances shown, it would be practically impossible to have a jury view the premises (R. 99). Thus, the problem of the long distances here was, in fact, further aggravated by the inaccessibility of the Reis ranch, and trial by jury would probably have denied both sides the opportunity of a view by the triers of the fact.

It is therefore not correct to say, as petitioner does, that the court below necessarily regarded this case as an "ordinary" or "usual" one. The order of the trial court here (R. 98, 99, 100), set out in detail its many factual findings as to the character, location, and quantity of the land involved and as to the other reasons which, in the interest of justice, impelled the court, in its sound discretion, to refer the case to commissioners. And, significantly, the material parts of the trial court's order, and of respondent Reis' affidavit were quoted at length in the opinion of the court below, making it clear that the Court of Appeals considered the particular facts of the case important.

The detailed factual recital in the affidavit and order is alone sufficient to distinguish the instant case from *United States v. Theimer,* 199 F. 2d 501 (C. A. 10). There the order appointing commissioners was reversed because the trial court's order was silent as to the specific facts or grounds therefore, except to simply give the court's conclusion that the interest of justice required the order.

There is, therefore, no conflict with the three Tenth Circuit cases. The *Waymire* and *Wallace* cases *(supra),* are in accord with the decision here, and the *Theimer* case *(supra),* is readily distinguishable on its facts.

3. Whether the Government has a *right* to a jury trial in the "ordinary" (Pet. 9) federal condemnation proceeding is a question not presented here, since each case must largely turn on its own particular facts. But whether the Government has a *right* to a jury trial under the specific facts here, was, we submit, settled by this Court in 1951 when the Court adopted Rule 71 A (h). The form of rule favored by the Department of Justice was proposed by the Advisory Committee in a May, 1948, report to this Court. Such proposed rule preserved the existing systems in the District of Columbia and in TVA cases, but provided for a jury to fix compensation in all other cases. (See Supplementary Report of the Advisory Committee, U. S. Code,

Congressional and Administrative Service, Vol. 2, pp. 2615 to 2622, at pp. 2615, 2616, 2617, 82nd Cong., 1st sess., 1951.) But after considering this draft, the Court returned it to the committee "for further consideration" (Supplementary Report of the Advisory Committee at p. 2615, *supra).* In March, 1951, after several years further study the present form of the rule was earnestly recommended to this Court by the committee, even though, as the committee report notes (Supplementary Report of the Advisory Committee at p. 2622, *supra*): "We regret to report that the Department of Justice still asks that subdivision (h) be altered to provide for jury trials in all cases where Congress has not specified the tribunal." This Court thereupon promulgated the rule notwithstanding the Department of Justice opposition. Since then the Department has been unsuccessful in its attempts to persuade Congress to change the rule by statute.

We do not doubt the Government considers the general problem of commissions or juries an important one. But, regardless of this case, it is likely to remain a problem, in the Department's view, until it can persuade this Court or Congress to change the plain words of the rule itself.

CONCLUSION.

The judgment of the court below, under the particular facts presented, is correct and just and should be affirmed.

Respondents therefore respectfully submit that the petition for a writ of certiorari should be denied.

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February, 1956.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No.—

UNITED STATES OF AMERICA, PETITIONER

v.

CHAMBERLAIN WHOLESALE GROCERY COMPANY AND W. G. COZARD, WALTER NEUGEBAUER AND MARIE NEUGEBAUER, WILLIAM R. ELLIS AND ESTHER ELLIS, AND ANDREW REIS AND MILLIE REIS

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The respondents, Walter and Marie Neugebauer, and William R. and Esther Ellis, hereby make and file this brief in opposition to the petition of the Solicitor General for a writ of certiorari in the above causes and so doing respectfully contend that the alleged grounds for certiorari do not in truth exist.

The petition purports to be premised on a conflict between the decisions of the Courts of Appeal of the 8th and 10th Circuits. The 8th Circuit Court of Appeals found no such conflict and so stated in the decision in the case at bar where the court said:

> "We are in accord with the decisions of the Court of Appeals of the Tenth Circuit in United States v. Waymire, 202 F. 2d 550, and United States v. Wallace, 201 F. 2d 65. We do not find the conclusion arrived at in United States v. Theimer, 199 F. 2d 501, controlling here. Affirmed." 226 F. (2) 492, 498.

Turning to the 10th Circuit cases we find the following:

In *U. S. v. Theimer* (C. A. 10), 199 F. (2) 501. The reason for appointing commissioners was "to remove all obstacles that caused delay and bring this action to a conclusion." The trial court made no statement or finding as to what prompted its action. So far as the opinion shows, no extraordinary circumstances were present.

In *U. S. v. Wallace* (C. A. 10), 201 F. (2) 65, Judge Murrah, who was one of the judges in *U. S. v. Theimer*, joined with Judge Phillips in the majority opinion, and they found a difference between that case and *U. S. v. Theimer*. The court says:

> "We think the instant case is distinguishable on the facts from United States v. Theimer, 10 Cir., 199 F. 2d 501. Here, the land was situated a long distance from a Federal court town. It would have been expensive to have taken a jury from the court town to view the land. It would have been inconvenient for the local witnesses who resided in the vicinity of the land to travel to a Federal court town to give their evidence. The land was of a peculiar nature in that it had a value for hunting and fishing. Only one 80-acre tract of land was involved. In view of those facts, we are of the opinion that the trial court, in the exercise of a sound discretion, was justified in ordering that the issue of just compensation be determined by a commission appointed by it."

The court could not more clearly hold that there is discretion in the District Court to order Commissioner trials.

In *U. S. v. Waymire* (C. A. 10), 202 F. (2) 550:

> ". . . In view of all these facts and circumstances considered in their totality, it cannot be said that the court erred in appointing a commission to fix just compensation for the various properties and rights in properties to be condemned."

The petitioner contends that this court's rule 71 A (h) requires a District Court to grant a jury trial in the absence of exceptional or extraordinary circumstance. Petitioner in effect takes the position that there can be no facts warranting the exercise of this discretion. On the other hand, the Court of Appeals of the 10th Circuit and now that of the 8th Circuit have recognized as sufficient to warrant trial to commissioners, a considerable number of factors which are described in the opinions above cited.

The matter is given careful consideration in the decision of the 8th Circuit in the case at Bar. The Court there recognizes the problem for what it is—simply a question of whether the evidence submitted warranted the exercise of the discretion of the trial court in favor of the appointment of commissioners. The Court concluded that it did, and summarized its holding in the final paragraph of its opinion, 226 F. (2) page 498, which reflects the unanimous opinion of the three judges who sat on the case.

The Court's opinion also shows what is made more manifest by this petition for certiorari, to-wit: That the Department of Justice has opposed Rule 71 A (h) since prior to its adoption. Apparently this is a further effort to nullify or limit its effect. Petitioner cites, bottom of Page 5 and top of Page 6 of his Brief, a report of a Judicial Conference (H. doc. No. 490 82nd Congress, 2nd session,

pages 5-6) which appears to be an effort on the part of a committee to work out a compromise, yet prevent the passage of Senate Bill 1958 (which would have required jury trials in these cases) in that Session. It is not to be compared or placed in the same class as authority with the decisions of the Courts of Appeal of the 8th and 10th Circuits.

WHEREFORE Petitioners pray that the petition for certiorari be denied.

Respectfully submitted,

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INDEX.

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Rule involved	2
Statement	2
Argument	3
Conclusion	5

CITATIONS.

Cases:

United States v. Theimer, 199 F. 2d 501 (C. A. 10)	3
United States v. Wallace, 201 F. 2d 65 (C. A. 10)	3
United States v. Waymire, 202 F. 2d 550 (C. A. 10)	3

Miscellaneous:

Federal Rules of Civil Procedure, Rule 71 A (h), H. Doc. No. 490, 82d Cong., 2d sess., p. 506	2, 3, 4, 5
Supplementary Report of the Advisory Committee, U. S. Code Congressional and Administrative Service, Vol. 2, 82d Cong., 1st sess., 1951	4